THE COMMERCIAL BANK OF CANADA

VS.

THE GREAT WESTERN RAILWAY COMPANY.

JUDGMENT OF THE COURT OF QUEEN'S BENCH,

DELIVERED DECEMBER 20TH, 1862.

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1862.

The Commercial Bank of Canada v. The Great Western Railway Company.

Hagarty, J.—It may be convenient to notice in the first place the resolutions of the court of proprietors of the Great Western Railway Company authorising the lending of money to the Detroit and Milwaukee Railway Company.

The first is of the London date, 8th October, 1857, and Hamilton date of 2nd November, 1857, and sanctions an "advance to the Detroit and Milwaukee Company of such an amount, not exceeding £150,000 sterling, as may be necessary to ensure the completion of the railway across Michigan, in connection with the Great Western Railway Company of Canada; such advance being made as a temporary loan, and on sufficient security, the expenditure of the same being subject to the control of the Great Western Railway Company."

The second resolution, dated, respectively, London, 7th October, 1858, and Hamilton, 2nd November, 1858, authorises the board "to advance to the Detroit and Milwaukee Company a further sum of money, not exceeding £100,000 sterling, to be expended by and under the control of the Great Western Railway Board of Directors."

The statute 22 Vic., ch. 116, sec. 11, allows the Great Western Railway "to use its funds, by way of loan or otherwise, in providing proper connections, and in promoting its traffic with railways in the United States," when sanctioned by two thirds of the shareholders, &c.; and enacts "that the loan of seven hundred and fifty thousand dollars already made by the said company to the Detroit and Milwaukie Railway Company is hereby declared to be lawful."

A large portion of the argument for the defendants was directed against the legality of an employment of the means of the Great Western Railway Company in making or completing this foreign road;—and it was contended that in any event the defendants had no power to borrow money from third parties to effect such a purpose, and that the present plaintiffs, when they advanced the sums now sought to be recovered, had full notice of the alleged illegal destination of the money.

I think it well to dispose of this branch of the case first.

From August or September, 1857, down to the occurrence of the present difficulty, the plaintiffs had been the bankers of the defendants, and when the Detroit and Milwaukee account was first opened the resolution for the £150,000 was known to the plaintiffs.

The clause already cited of the act passed on the 16th of August, 1858, removed all questions of the legality of the first advance, and I presume is declaratory in its nature. It also prospectively gives full power to the Great Western Railway Company "to use its funds, by way of loan or otherwise, in providing proper connections, and in promoting its traffic with railways in the United States."

On the face of the second resolution, passed shortly after this statute, there is nothing to shew the special purpose of the £100,000 advance to the Detroit and Milwaukee Company. It is simply spoken of as "a further sum of money, to be expended by and under the control of the Great Western Railway Board of Directors."

The bankers of the Great Western Railway Company may be assumed to know that the legislature had expressly sanctioned a very large loan to the foreign railway: that it had been really intended to be used, and was used, not merely in making connections and promoting traffic, but in constructing and equipping the line itself: that the road required further aid, and that parliament allowed such aid for certain specified purposes: that the Great Western Railway Company had determined on a further advance of a lesser sum than that first loaned; and that the lenders were to have the actual expenditure of the money. Such money *might* very well be applied strictly within the words of the statute, though it may be safely assumed, from looking over the items of account, that large portions at least were applied in the general construction and equipment account, and in payment of debts due by the Detroit and Milwaukee Company. Among the exhibits in evidence I find a copy of a resolution of the English board of the 12th of October, 1858, stating that the second loan of £100,000 was granted specifically to provide rolling stock and station accommodation to the line of railway opened by the aid of the former grant. There seems to be

no evidence of this resolution, passed five days after the voting of the second loan, being made known to the plaintiffs.

I have a strong opinion that, independently of the express sanction of the first loan, the application of the Great Western Railway Company's moneys actually to construct and equip the Detroit and Milwaukee line was not within the plain meaning of this eleventh clause, and that any shareholder applying within a reasonable time to a Court of Equity could have restrained such a proceeding. The legislature never could have contemplated, under such words as "providing proper connections, and in promoting its traffic with railways in the United States," that a Canadian company should apply its means towards the building of a road 187 miles long across the state of Michigan. But the end of the clause expressly legalises the loan already made, without any statement as to its object.

It is quite true that after the bankers had agreed to make advances, and as the drawing of the money from them proceeded, they might apprehend, from the nature of many of the payments made through them, that the money was being applied to questionable purposes. For example, many charges occur in the account before us for coupons of the Detroit and Milwaukee Company paid through the bank. Such payments might hardly come within the permissive words of the act, but we must consider the position of the parties, bankers and customers. Having once agreed to make advances, without notice of any intended illegality, and aware that large sums might be required for perfectly allowable objects, it seems hardly consistent with our ideas of the requirements of business that we should hold the bankers or their clerks bound to scrutinise every cheque presented or every account directed to be paid, with a view of ascertaining if it came within the lawful powers of the customers' charter.

Being permitted to advance money to the foreign company for lawful purposes, it might well be that by some arrangement between the companies some of the moneys contracted to be expended in making connections, &c., might be handed back to the Great Western Railway Company to be applied by them in retiring a certain number of coupons, the foreign company in lieu thereof itself finding an equal

amount of funds to do the work first agreed to be done by the Great Western Railway Company.

Or, in another aspect of the case, it may be well to consider whether, in consequence of previous arrangements or advances with which the plaintiffs had no concern, the Detroit and Milwaukee company had, as it were, fallen into the hands of the Great Western Railway company, and the latter had the alternative either of completing the road or losing altogether the large sums already spent upon it. The court of proprietors of stock sanction a large advance to aid the foreign road: parliament, after some delay, expressly sanction this advance, which is expended in endeavouring to complete the road: the shareholders consent to a further loan; and the bankers through whom the first loan is expended, are applied to to furnish funds from time to time on the faith of this new vote. It seems to me that in such a case to decide against the bankers' right to be repaid their advances would be pushing the *ultra vires* doctrine further against third persons than it ever has been previously urged.

Or, again, if a railway company without parliamentary sanction, and even if liable to be restrained by equity on application of its own stockholders, as a matter of fact under the authority of a vote of the shareholders take possession by arrangement of a wholly independent line, and work it with their own funds and under their own officers, and make payments from day to day by cheque on their ordinary bankers, with whom their own proper account is kept, I hardly see my way to agree that the bankers are bound to enquire into the purpose for which each cheque is drawn, or, even with knowledge of what was going on, to be debarred the right of recovering a general balance on an over-drawn account because the moneys sought to be recovered went, in fact, to the maintenance of the other line.

We have not, however, to consider the equity of shareholders to restrain the application of corporate funds to a purpose foreign to the objects of the joint adventure. In such a case they must apply for relief with reasonable promptness, as early as practicable, to prevent the creation of new rights and obligations; and by unexplained delay they create, as has been said, a new equity against themselves

sufficient to bar their claim to relief. The law on this subject is well explained by Lord *Cottenham* in Graham v. The Birkenhead and Lancashire, &c., Railway Company, (2 MacN. & G. 156, 6 Eng. L. & E. Rep. 132,) and was before our Court of Common Pleas, in Moore v. Chambers, (11 C. P. 453.) By lying by and knowingly permitting his directors to expend their own money and moneys borrowed from others on a purpose to which he objects, the Great Western shareholder may bring himself within Lord *Cottenham's* words: "He has permitted things to get into that state which makes the injunction a proceeding not only not enforcing an equity, but calculated to inflict great hardship and injustice."

If therefore the individual shareholders may have lost their right to dispute their directors' proceedings, the case seems far stronger against allowing the corporation as a body to repudiate its own acts on the ground of any alleged illegality. It might be very different if they urged such an objection to a suit against them to compel them to perform, or for damages for not performing, an illegal or *ultra vires* contract. Here, having induced third persons to alter their position by advancing large moneys, they seek to urge it as a bar to their recovery, and to establish their own right to retain such moneys.

I cannot consider the advance of money by the plaintiffs for the purpose of assisting the Detroit and Milwaukee Company as analogous to the well known class of cases where money is lent or given expressly for gambling, or stock jobbing, or other objects declared illegal by statute, or for an immoral or unlawful purpose, such as McKinnell v. Robinson, (3 M. & W. 434,) and cases there cited. Here the legislature had expressly sanctioned one loan to this foreign company, and had permitted loans of money to the same or any other United States road for certain purposes, and I cannot believe the law to be so rigid against parties actually advancing moneys to a company, that where the whole sum *may* be expended in a perfectly legal manner, it cannot be recovered because all or part *has* been expended on objects not warranted by the legislature.

On this branch of the case the facts may not be unfairly stated thus:—The Great Western Railway ask

their bankers to lend them money, alleging that they have resolved to help the foreign road to the extent of £100,000. The bankers look at the statute, and find them authorised so to do for certain purposes, such as "providing proper connections and promoting its traffic." If the diversion of any part of the Great Western Railway funds to aid a foreign road were unsanctioned by law, the defendants' objections would at once assume a more intelligible form. Desiring to preserve untouched the equity of shareholders to prevent any application of the common stock to purposes foreign to the common design, I think it would introduce infinite confusion and uncertainty in commercial dealings, and especially in the relations of banker and customer, to accept the defendants' view of the law in a case like the present.

It is also objected that, although power is given to the defendants to "use its funds" in the foreign company, yet they cannot legally *borrow* money from the plaintiffs for such purpose. A case can readily be supposed of the directors of a company, having expended all their authorised capital, not being authorised to borrow further means to carry on their adventure. Burmester v. Norris, (6 Ex. 796,) cited in the argument, is of that nature. *Alderson*, B., says "It would make a vast difference to the shareholders if the power contained in these words," (viz. that the directors should have sole control in managing the affairs and business of the company,) "were to be construed as imposing on them an unlimited responsibility beyond the capital which they supposed they would have to subscribe, and with which the concern was to be entirely carried on."

Here the act authorising the loan permits an increase of stock to the extent of two millions of pounds, and the creation of a debenture stock, and speaks (sec. 4) of the company's power to issue bonds for borrowed money "whenever it may be by them deemed expedient to avail themselves of the power of borrowing money by such means." The act of 1853, 16 Vic., ch. 99, sec. 3, gives the company power to borrow from time to time, for making, completing, and working the railway, and to make the bonds, &c., issued for securing payment of money so borrowed convertible into stock, &c.

In the Bank of Australasia v. Breillat, (6 Moore P. C. C. 152, 195,) Lord *Kingsdown*, in reference to the case of a public company under a deed of settlement containing no express borrowing powers, says, "We have no doubt at all that in ordinary banking partnerships the power of borrowing exists, and the directors by the terms of their appointment had all the general powers, and among the rest the power of borrowing, unless such power is excluded by other provisions of the deed."

In Maclae v. Sutherland, (3 E. & B. 38,) Lord *Campbell* cites this judgment with great approbation, and adds, "Although mere shareholders in a joint stock company have no authority to pledge the credit of the company, the directors appointed to carry on the business would have impliedly such of the ordinary powers of partners in a common mercantile partnership as are necessary for the carrying on the business for which the company is formed; and, where a joint stock banking company is established, the directors would be considered the agents of the shareholders to borrow money for the ordinary purposes of the business, and to give securities in the ordinary form for the money borrowed." He adds these suggestive words:—"The shareholders may have been very ill-used by the directors, (who are acquitted of any personal misappropriation of the funds of the company,) although it is possible that they may, in common with themselves, have been under the delusive hope that enormous gains would be made from the speculations, * * and that, all concerned being enriched, the engagements of the company would all be honourably fulfilled. But, whether the directors have misconducted themselves towards the shareholders or not, the loss that has accrued cannot, according to our views of the case, be thrown upon the *bonâ fide* creditors of the company."

I cannot doubt the applicability of this view of the law of joint stock banking companies to a railway company. The latter is also a great trading corporation, in daily receipt and disbursement of large monies, executing and maintaining costly works, often called on to disburse large sums, possibly at the moment beyond their available funds in hand. I think their directors must be held to possess all powers

necessary to obtain advances for their business purposes, either on loan or over-drawn account, from their bankers, and that the corporate body which they represent must be as such bound to repay.

I do not feel pressed by any difficulty suggested by defendants' counsel on this branch of the case. Assuming that the company had power to use its funds in aiding the Detroit and Milwaukee Company, I cannot draw any distinction between advances made by their bankers for this or for the general and legitimate purposes of the work:—or, in other words, between the right of bankers to insist on repayment of defendants' overdrawn account for moneys expended on the foreign road and on the Great Western road itself, or for payment of the officers or work-people on the line. The evidence does not present the case of a formal borrowing of a specific sum or sums by way of loan, but the common case of a bank account largely overdrawn, instead of being covered by deposit of moneys or by proceeds of exchange.

I cannot understand any difficulty existing against the right of the bankers of any mercantile or trading company to enforce payment of any balance due them on an overdrawn account, arising in the course of ordinary business, because no bond had been given or document executed, as is usual in the case of a formal borrowing of specified sums.

We have now to consider the manner in which the evidence shews this heavy claim arose.

When the Great Western Railway Company decided on making the first loan to the Detroit and Milwaukee Company, it was expressly provided that the expenditure thereof should be subject to their own control. At this time Mr. Brydges was their managing director, and Mr. Reynolds their financial director. It seems clear that these two gentlemen had the authority of those advancing the money—that is, the shareholders—to control its expenditure. Mr. Brydges in his statement, (at page 86,) and his co-director Mr. Becher, (at page 78,) are explicit as to this. The resolution of the English board, dated the 10th of November, 1857, directs that the expenditure shall be wholly under the control of Brydges and Reynolds. This at least is the light in which the matter is placed by the defendants at the trial.

As already remarked, the plaintiffs had been acting as the defendants' bankers from August or September, 1857, and it was on the 2nd of November of that year that the resolution for the first loan, having been passed in England, was adopted by the stockholders in Canada. Security was required by the form of the resolution.

After some negotiation, it appears that on the 1st of January, 1858, a mortgage was executed by the Detroit and Milwaukee Company, transferring to Messrs. Brydges, Reynolds, and Becher, as trustees, all the real and personal estate, vesting in them the control of the expenditure of the funds necessary to complete the line, and also the management of the railway and disposal of the net income, for assuring the repayment to the Great Western Railway Company of money advanced or to be advanced, with interest at ten per cent.

On the 22nd of January, 1858, Mr. Brydges became President and Mr. Reynolds Vice-President of the Detroit and Milwaukee Railway Company, retaining however their respective official positions in the Great Western Railway Company; and the Detroit and Milwaukee board of directors was remodelled, by placing thereon two of the English board of the Great Western Railway, and one other of the Canadian Great Western Railway board, Mr. Becher, leaving only three American directors; and some $2,500,000 of the Detroit and Milwaukee stock was transferred to the English Great Western Railway board.

On or about the 29th of December, 1857, the negotiation took place between Mr. Reynolds and Messrs. Ross and Park of the Commercial Bank, respecting which there is such a diversity of statement between the first gentleman and the other two, and on which I defer at present making any remark.

Mr. Reynolds, then being financial director of the Great Western Railway Company, informs the plaintiffs' cashier, Ross, of the £150,000 loan, and that he and Mr. Brydges were to superintend its expenditure. An account is proposed to be opened with the plaintiffs; and in Reynolds' own words (page 74,) "I asked him to allow us to open an account against which we could draw." * * "I told him (page 67) that Mr. Brydges

and myself would like to draw to the extent of our requirements in carrying out this undertaking of the Detroit and Milwaukee, and at the end of each month we would cover the amount by bills of exchange on England."

The fact seems to be clear, that these gentlemen procured an account to be opened: that they were to be allowed to draw as they required, paying into the plaintiffs' hands the receipts of the road; and agreed to cover the amount by monthly drafts on their English Great Western Railway Board.

Their first draft, of £6000, under this arrangement is dated 2nd of February, 1858, and is payable to the order of the plaintiffs' manager (Park,) and is addressed to the London Board of Directors of the Great Western Railway of Canada Company, Old Broad Street, London, who are directed to place the amount to the account of the trustees of the Detroit and Milwaukee Company; and the bill is signed C. J. Brydges, Managing Director; Thomas Reynolds, Financial Director.

The transaction thus began; the plaintiffs to be repaid their advances by deposit of the receipts of the Detroit and Milwaukee Company, of which the chief Canadian directors of the defendants were President and Vice-president, and by exchanges drawn on the defendants' London Board.

It may be convenient to notice here, that by the act already cited, 22 Vic., ch. 116, sec. 12, it is declared, after reciting that the defendants had a section of their board of directors in England, that the company has had and shall have power to establish an office in London "for the purpose of regulating and carrying on the business of issuing and transferring shares and bonds, and generally to do all matters and things necessary or desirable in regard to the transferring of *or arrangements connected with the capital of the company held out of Canada, and that all such acts and proceedings shall be considered precisely the same as if carried on in the office of the company in Canada.*"

It may be well to bear this clause in mind in considering the position taken by the defendants at the trial—that the Canadian directors as a board (of course excepting Brydges

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and Reynolds,) took no part in the expenditure of these loans to the Detroit and Milwaukee Company.

The account being opened, it would seem from Mr. Reynolds' evidence, (page 67-8) that moneys were chequed out on cheques signed by Brydges and Reynolds, without any addition to their names, till the end of 1858, when printed cheques were used, and countersigned by the secretary and accountant of the Detroit and Milwaukee Company.

A reference to the voluminous particulars will exhibit the progress of the acconnt and its ultimate result in the formidable balance claimed by the plaintiffs. The first exchange given on the defendants' London Board was on the 1st of February, 1858, and the last apparently about the 30th of December, 1858.

It would appear from defendants' evidence that the Great Western Railway Board in Hamilton (except Messrs. Reynolds and Brydges) took no part in this expenditure or dealing with the Detroit and Milwaukee Company, or in drawing the exchange on the London Board, except that when the drafts were accepted in England they came before the Canadian Board by way of return. (See Brydges' evidence, page 86.)

It may be considered as established beyond controversy, that the Great Western Railway Company resolved to advance two large loans to the Detroit and Milwaukee Company, on getting security, and on condition that their own managing and financial directors should wholly control the expenditure: that the required security was given, and the Detroit and Milwaukee Road and all its resources (subject to some prior claims) transferred to the two last named gentlemen and Mr. Becher, their co-director, as trustees: that a new account was opened with the Great Western Railway bankers, and large advances obtained on the agreement that all receipts of the road were to be deposited with the bankers, and the amount behind-hand covered from time to time by sterling exchange drawn by the managing and financial directors as such on the defendants' London Board; and the final result is a very large balance in favour of the plaintiffs, for which this action is brought.

Before discussing the opposing views of the parties as to

whom credit was given to in this newly opened account, I think it fitting to notice the objections of defendants' counsel as to the absence of any assent by defendants evidenced by their common seal to becoming the plaintiffs' debtors. This can best be considered under the assumption that the credit was sought and accorded as the plaintiffs' witnesses represent it, and that the bankers understood they were trusting the Great Western Railway Company, and that the latter acted throughout the dealings as if they considered themselves as responsible.

My very strong impression is that in such a case a liability may be contracted by the directors of a trading and commercial association like a railway company to their bankers, for the re-payment of advances, without the formality of a seal. The current of modern authority seems clearly to run in that direction, and I think this court would be adopting a retrograde course were it to hold otherwise, and would be departing from the views of the law adopted by us in our own Court of Appeal, in the cases there decided, and of the English Queen's Bench in such cases as Henderson v. The Australian Navigation Company, (5 E. & B. 409,) and Reuter v. The Electric Telegraph Company, (6 E. & B. 341.) In the first-mentioned case *Wightman*, J., says, "The general result of the cases seems to be that, whenever the contract is made with relation to the purposes of the incorporation, it may, if the corporation be a trading one, be enforced, though not under seal." Sir *William Erle*, says, "I cannot think that the magnitude or the insignificance of the contract is an element in deciding cases of this sort. * * I think myself that it is most inexpedient that corporations should be able to hold out to persons dealing with them the semblance of a contract, and then repudiate it because not under seal."—But it is not necessary to pursue this subject further. Our views have been so frequently and copiously expressed on this point, that I need only refer to Pim v. The Municipal Council of Ontario, (9 C. P. 304,) and Whitehead v. The Buffalo and Lake Huron Railway Company, (8 Chancery Reports, U. C. 157,) in the Court of Appeal for Upper Canada.

At the trial the only issue raised was never indebted, to a

declaration on the common money counts. After reservation of leave to move on the legal exceptions, certain questions were, after much discussion, submitted by the learned judge to the jury.

The most important was the first, as to whom the credit was given to by the plaintiffs—to the defendants, or to the Detroit and Milwaukee Company, or to Messrs. Brydges and Reynolds personally. The jury found this in favour of the plaintiffs, that in fact credit was given and the money advanced or lent by the bank to the Great Western Railway Company.

I do not see that this leading point of the case could be disposed of except as a matter of fact for the jury on the evidence.

I do not feel pressed with the exception taken to the form of the question, that it should have been "*accepted*" as well as given. In leaving such a common question to a jury, I understand the enquiry involves the whole circumstances of the bargain; and that in finding that credit was given to the Great Western Railway Company I must infer that the jury found such to be the true nature and effect of the dealing between the parties—namely, a pledging of credit and an agreement to accept such pledge, and to make advances accordingly.

Messrs. Park and Ross speak very decidedly as to their view of the agreement, and of their refusal to make advances on the credit of the Detroit and Milwaukee Company. Mr. Reynolds denies this view to be correct. Mr. Brydges adopts his colleague's version so far as his personal knowledge is concerned; but I gather from a perusal of these gentlemen's evidence that their idea would seem to have been that to the extent of the loan or loans voted by the shareholders they were to see the bank repaid.

The letter of the 16th of December, 1858, shortly after the voting of the second loan, and signed by them officially as managing and financial directors of the Great Western Railway Company, states expressly that the Great Western Railway Company "holds itself liable to the Commercial Bank for all overdraft on the Detroit and Milwaukee Com-

pany's account with the said bank. This is quite understood by us; but as you expressed a wish to have it placed on record we now do so by means of this letter."

It is unnecessary to notice any of the arguments at the trial or in term, as to the insufficiency of this letter as "a guarantee." I only regard it as evidence of the parties' own view of the state of the case when it was written.

I have no doubt whatever that in weighing the value of the opposing testimony it had much weight with the jury, when viewed in that light. Mr. Reynolds, (at page 71,) says that when he wrote that letter he supposed he was pledging the Great Western to the payment of the overdraft to the extent of the loan which he and Brydges were empowered to expend on the Detroit and Milwaukee Railway, and that at that date there was about $385,000 due to the bank, and there was a sum of the loan (or loans?) remaining to be expended equal to the balance then due the bank. Again, (at page 75,) he repeats this—that the letter was written to give Campbell (the bank inspector) an assurance "that he would get the balance from the Great Western Railway's unexpended portion of the loans."

Mr. Brydges (at page 84) says the letter was never intended to make the Great Western Railway liable for an unlimited amount of advances; it was to assure them (the plaintiffs) that they would get the balance of the loan; and he adds that he thinks they did get as much as $358,000, (*Qy.* $385,000.)

Again, he says, (at page 87,) "Why it did not occur to me to make this letter different from what it was, is that at the time the second loan was granted we made out a statement, which was sent to London, shewing that at the end of 1859 it was expected that the Detroit and Milwaukee account would be about balanced. We were, however, disappointed in our expectations in regard to the traffic of the line. At the time the letter was written, it was supposed that the unexpended portion of the £100,000 loan would suffice to balance the account." * * "We expected that the traffic of the line and the unexpended portion of the loan would make up the balance." (page 88.)

The account from this time kept on constantly increasing, and over $358,000 (the balance above mentioned) was after that paid, as Mr. Brydges states, into the bank as part of the general account, but not on any particular arrangement on account of the overdraft existing at the date of the letter.

Mr. Brydges also states (page 90) that large sums were paid for coupons, old debts, &c., out of the loans, but he would not admit as much as £100,000. The whole amount of the loans was expended either in that way or in work on the road.

Mr. Reynolds (at page 69) states from a memorandum that $709,850 of the two loans had been paid to the Commercial Bank. This in round numbers would seem to leave about £100,000 of the loans unpaid to the bank.

In the particulars of claim I only find one entry of credit for sterling exchange, amounting to $48,166·66. on the 30th of December, 1858, after the granting of the second loan ; and the account rapidly increases in favour of the Bank from that time.

If the question of credit and liability were properly submitted to the jury, I cannot say that they had not evidence before them to warrant their finding in favour of the plaintiffs.

The defendants' counsel have argued with much force that, assuming Messrs. Brydges and Reynolds to have in fact pledged the credit of defendants, they had no right so to do, and could not thereby bind the corporation.

This again raises the old question as to how a corporation can be bound. I have already expressed an opinion on this point. This trading company must act through certain officers. They resolve to loan money to another company. That money has to be first obtained in England and then transmitted to Canada, to be there expended by certain officers of the lenders' company. Exchange has to be drawn for it, and these officers are appointed to draw such exchange. These officers inform the ordinary bankers of the company of all these facts, and propose and agree (as the jury have found) that if the bankers advance money to the company to be expended as aforesaid on the faith of this arrangement, they, the company's officers, will pay

in all the earnings of the foreign company, and cover all deficiencies by exchange drawn by them on London against the loan.

I am unable to see any sufficient reason for holding such an arrangement to be of no binding effect on the company.

If the facts be as the jury found, is it more than the common case of overdrawn accounts between bankers and corporation customers?

If the London board had sent their manager and financial director to their London bankers with the resolutions, and with the authority above noticed, and on the faith thereof the bankers had given these gentlemen large cash advances, which the latter applied, as their directors had resolved they should do, to the work on the Detroit and Milwaukee line—in such case, in the absence of any express agreement as to the object of credit, could not such advances be recovered from the Great Western Railway company?

Again, if Messrs. Brydges and Reynolds, after communicating to the Commercial Bank in this country all that is proved to have been communicated by them, had drawn exchange on the London board, and obtained from the plaintiffs the proceeds thereof, and applied such proceeds according to their instructions on the Detroit and Milwaukee road, and such exchange had been dishonored, would the Great Western Railway Company be responsible for the cash advanced as for money lent, apart from any formal liability on the bills of exchange as such?

We know that corporate bodies are held liable for money had and received to the use of another, without evidence under seal: that they have been held responsible in trover and false imprisonment, and even for libel, on the acts of their officers, without seal. We know that under the winding up acts, where money was shewn to have been borrowed by a company's secretary without authority, but was proved to have been actually expended on the company's business, it was allowed to the lender. *In re* The Electric Telegraph Company of Ireland, Troup's Case, (7 Jur. N. S. 901,) Hoare's case, (*Ib.*) Also, where a Life Assurance company entered into the Marine Assurance business, although their so doing was

held to be *ultra vires*, *Wood*, V. C., decreed a return of the moneys paid to them for premiums for the void marine risks: *Re* Phœnix Life Assurance Company, Burgess and Stock's case. (7 Law Times Rep. N. S. 191.) He notices in his short judgment the paucity of direct authority on this subject.

It was asked by defendants' counsel on the argument whether the Bank had or had not a claim for their advances against the Detroit and Milwaukee Company, or could the latter, if sued therefor, have successfully contended that the credit was exclusively given to the present defendants.

I have considerd this suggestion, and feel some hesitation in speaking with any precise conclusion on the subject.

In 1860 a sale took place under a Chancery decree of the United States Circuit Court for the state of Michigan. Mr. Gray, a Detroit solicitor, proved that he acted in foreclosing the mortgage held by Messrs. Brydges, Reynolds, and Becher, on the Detroit and Milwaukee road: that on the 6th of August, 1860, an agreement, proved at the trial, was made, (see page 89,) reciting that defendants' (the Detroit and Milwaukee company's) counsel had consented to a sale, and that the trustees above named (who were plaintiffs) agreed with Mr. A. Campbell, as trustee for the Commercial Bank, that the plaintiffs might bid in the property, and that a new corporation under the laws of Michigan should be formed, succeeding to all the property and franchises of the old company: that a seven per cent preferred stock in the new company should be issued to the amount of the debts mentioned in a schedule annexed—the new corporation to pay such debts at periods named: that if the plaintiffs or the new corporation should not pay as agreed the decree might be vacated and held for nought, and that the trustee might interpose and recover said debts, and take all proceedings against all persons or corporations liable as if the decree had not been entered; and declaring that such agreement or any proceedings thereon should not be considered as an election of the remedies of the bank for said debt, but as a means of payment and a proceeding solely collateral.

In the schedule a debt of $1,039,203 98c is set down, which I understand to be the then claim of the Commercial Bank.

The road was sold, and bought in by the trustees, Brydges, Reynolds, and Becher.

Mr. Campbell was inspector for the Commercial Bank. Mr. Ross says that he (Campbell) took this course thinking it best for the bank: that nothing was done by the board thereon then or since.

Of course it can only be on the assumption that the Great Western Railway company were the principal (if not the only) debtors of the Bank for these advances that the latter can recover. Their position is incompatible with any idea of the defendants being only secondarily liable, or as sureties for the Detroit and Milwaukee company. I do not feel that because a claim could be succesfully urged, or a proof be allowed in bankruptcy, against the Detroit and Milwaukee company, we must necessarily conclude that the Great Western Railway company are not therefore the principal debtors. Embarrassing questions may be raised by such a suggestion, but I cannot find that any such can prevent its becoming properly a question of fact as to whom the credit was given to, and to whom was the plaintiffs' money actually lent, and by whom was it to be repaid.

The plaintiffs' position is, that from the beginning the credit was given by them to the Great Western Railway Company: the latter insist that it was given to the Detroit and Milwaukee Company; and the manner in which the accounts were kept is much discussed.

It is quite clear that from the beginning it was understood and agreed on both sides that the new account should be kept distinct from that of the Great Western Railway proper. The reason for this was obvious, and does not of itself afford any clear argument for or against the present claim. The ground work of defendants' proposal to the plaintiffs for advances, was the resolution to advance a specific sum to the Detroit and Milwaukee Company, to be expended by Brydges and Reynolds, and of course such expenditure must be kept distinct from their own proper accounts for their own stockholders with their bankers. So with the proposed manner of meeting the bank's advances—namely, payment of the Detroit and Milwaukee Company's receipts, and sterling

exchange on the London Board on account of the loan. This arrangement, on which there is no controversy, necessitated a distinct keeping of the accounts.

The plaintiffs allege that to keep the defendants' liability in view the account was opened and continued in their books as "*Detroit and Milwaukee Railway Company account—Great Western Railway.*"

A vast mass of cheques, bills, notes, letters, and documents of all kinds, is produced from the very extensive dealings of the parties, extending over two or three years. So long as no difficulty was apprehended between the parties there was little care apparently taken in adhering to any special or formal headings of documents, or additions to official signatures. Once it was settled that the two accounts were to be distinctly kept, it is easy to produce any number of documents from which it could be readily gathered that the Detroit and Milwaukee Company were the debtors of the bank, and on which the actual liability of any other person or body would not appear.

Each of the litigants can produce numberless letters and papers to which signatures are attached simply in the individual names of the writers, or with such names followed by an official designation, just as each may desire to draw an argument from the absence or presence of such an addition. Thus notes were taken in large amounts from the Detroit and Milwaukee Company; bonds were given in certain financial emergencies under the seal of the Great Western Railway Company; in short, whatever document or obligation seemed best calculated to obtain credit or raise money was readily resorted to.

A very careful perusal of all the mass of papers induces me to attach a far less degree of importance to these matters than they possibly have attained in the minds of the very able and zealous advocates of the parties.

Some of the strongest of the letters relied on by the defendants are to be found under dates long subsequent to the often quoted letter of acknowledgment of the 16th of December 1858, when the plaintiffs had pointedly obtained from Brydges and Reynolds the admission of the Great Western Railway Company's liability.

I may instance such letters as that of Sorley, the bank accountant, addressed to the Vice-President of the Detroit and Milwaukee Company, (Reynolds), asking him for a certificate "of the balance due this bank by your company on account as on the 10th instant." This is on the 14th of October, 1859. Again, the letter of Mr. Park of the 10th of November, 1859, referring to the $200,000, "special loan by this bank to the Detroit and Milwaukee Railway Company," and asking for renewals of the notes given therefor, "the bonds of the Great Western Railway for an equal amount being still held by us as collateral until the bill or bills are paid;" and a similar letter of the 15th of the same month.

Something was said, and more was hinted, as to parties connected with the bank having had dealings, either personally or for others, in the Detroit and Milwaukee Company's securities, which were in the market at very heavy discount; and possibly this may account for some of the very lively interest evinced by some of the writers of the letters in evidence, as to the standing, credit, and prospects of this company.

I attach much higher importance to the communications between the parties at or about the time when the account was first opened, and while the origin and true bearing of the agreement were most fresh in the recollection of all parties.

The dealing commenced about the 29th of December, 1857, and depends, firstly, on the verbal testimony already noticed.

Within a few days of this, Messrs. Brydges and Reynolds went to New York, to arrange with certain creditors of the Detroit and Milwaukee Company there. On their return they write a letter to Mr. Ross, dated January 11th 1858, signed by them as managing and financial directors of the Great Western Railway, asking the bank to guarantee certain bills, which they say they had given to Rayner & Clarke, for a claim on the Detroit and Milwaukee Company, which they had settled, they say, "by giving our acceptance of Mr. Trowbridge's drafts on this company," (the Great Western Railway,) setting out the amounts, "each being dated from

Detroit, 8th December, 1857, signed by C. C. Trowbridge, treasurer of the Detroit and Milwaukee Company, and accepted by us as managing and financial directors, respectively, of the Great Western of Canada Company."

I quote this as illustrating the then understanding of the parties, and suggestive of the question whether the bank, having paid the bills at maturity, would on this letter have naturally looked to the Great Western Railway Company for repayment, or to the Detroit and Milwaukee Company, or to Messrs. Reynolds and Brydges personally?

Shortly after, on the 30th of March, 1858, the letter of Brydges and Reynolds is written to Ross, requesting the credit of $100,000, if required, "on our joint Detroit and Milwaukee account here," stating that "the balance against the Great Western Company is now so much reduced, (and will continue steadily to decrease,) that we imagine you will have no objection to the arrangement here proposed. * * We desire to adhere as nearly as we can, in drawing on our English colleagues, to the amount set down in the schedule we prepared for the gradual completion of the works on the Detroit and Milwaukee line; and this proposed credit would enable us to do so without the necessity of postponing claims which could, if promptly settled, be much more satisfactorily arranged;" and they ask this to be submitted to the bank board.

On the 1st of April, 1858, two days after, Mr. Ross answers this favourably, "under the impression that any amount on the Detroit and Milwaukee account not covered by bill at the end of each month, will be (practically) neutralised by a corresponding reduction of general account, under the limit of £50,000, * * that on the 1st of December next the Detroit and Milwaukee account shall be covered in full by exchange or cash. * * We assume that the aggregate amount of the Detroit and Milwaukee account uncovered at each month's end, and of the general account, will not exceed $200,000; but in case of emergency we shall not mind an excess of $25 to $40,000 for a short time." This is addressed to Brydges and Reynolds, directors of the Great Western Railway. The latter answer this letter on the 14th of April, agreeing to the conditions, except as to

the 1st of December limit: "We have every expectation that within six months from this date the Great Western account will be in a condition not to require the open credit which it at present enjoys, and if this expectation should be realized we presume there would be no objection on the part of the bank to carry the Detroit and Milwaukee credit on to the 31st of March next."

This correspondence, so shortly following the opening of the account, and before any difficulty seems to have been anticipated, is valuable for ascertaining what the parties themselves seemed to understand of their respective positions. It certainly is not without great weight towards supporting the plaintiffs' view, that they and Messrs. Brydges and Reynolds then considered that the dealing was directly between the Commercial Bank and the Great Western Railway Company.

At a much later date, on the 25th and 28th of May, 1859, we find letters and statements written by Messrs. Brydges and Reynolds to the bank, which are important as shewing the manner in which the accounts of the two companies are referred to, the liabilities and the net receipts of each, excusing the not giving of sterling exchange, and in the last letter enclosing the notes of the Detroit and Milwaukee Company for large amounts, and Great Western Railway bonds, to be used by Ross in New York as collateral security in endeavouring to raise money on the Detroit and Milwaukee notes. The bank were to get the proceeds of the notes to provide funds in lieu of the sterling exchange which Messrs. Brydges and Reynolds could not then provide.

It is necessary here to notice the argument that Messrs. Brydges and Reynolds personally were those to whom the plaintiffs gave credit when the account was first opened.

I hardly understand the evidence of these gentlemen as leading to that conclusion. Mr. Reynolds says (at page 73) "We opened an account in our joint names as individuals:" and in answer to the question, Was it not for the Great Western Railway? "It was in pursuance of the instructions to expend the money." * * "It was an interim arrangement for the purpose of aiding us in carrying out the instructions

on account of the Detroit and Milwaukee Railway Company. * * We opened the account and made the arrangements with Mr. Ross purely on our own responsibility: we had no instructions whatever to do so for the Great Western Railway Company. To the question, "But was it your own transaction, your own speculation?" *Answer*, "Certainly not." To the question, "Was it the Great Western Railway's business?" *Answer*, "It was the Great Western Railway's business to find the money, but it was our business to spend it."

Mr. Brydges, after denying any authority from the Great Western Railway shareholders to incur liability on their account, (at page 86,) to the question, "How did you look upon the matter yourself—that you were opening an account on behalf of the Great Western, the Detroit and Milwaukee Company, or yourselves?" *Answers*, "Certainly not the Great Western." On this answer of Mr. Brydges, this question suggests itself to me:—Could he carry out his instructions to draw the amount of the loans from England except by exchange, which he must negotiate with parties here, receiving from them the cash proceeds? His directors do not argue that they could repudiate his exchange on them drawn with their sanction. I hardly see, if so, how the cash so given or advanced by bankers discounting the drafts to the company's officers can be looked upon as lent to those officers on their personal credit. It would more naturally seem to be advanced on the credit of the bills being duly honoured by the drawees.

I do not think that on the evidence it can fairly be considered that the credit was given to these gentlemen individually, whatever might be their personal liability (as Mr. Reynolds suggests) if their acts had been repudiated by their principals.

The jury, on this question being left to them, negatived, as I think justly, such a conclusion.

It is almost impossible to comment in full on all the evidence and documents submitted. I must content myself with noticing what seem to me to be the prominent features of the case.

I will now examine the objections taken to the admission of evidence :—

First, in allowing the minutes of the plaintiffs' board of directors to be read on the application of Brydges and Reynolds for the $100,000 credit. This minute is of the same date, the 1st of April, 1858, with the plaintiffs' letter in reply to the application already noticed. The only material difference between the minute and the letter is, that the former speaks of the "application from the Great Western Railway for a credit of $100,000 on their Detroit and Milwaukee account as considered by the board; and again "the understanding being that the aggregate amount of the accounts of the Great Western Railway Company will not exceed £50,000 to £60,000 Cy."

It appears to me that this minute was properly received in evidence as part of the transaction, and that the tendency of modern decisions is clearly in favour of admitting proof of all things done by parties at the time of entering into a contract, to prove their respective understandings of it.

The case in the Exchequer of Milne v. Leisler, (5 L. T. Rep. N. S. 802,) strongly illustrates this. The point was this :—A. applies to B. to purchase goods, representing, as B. contends, that he was buying on account of G. and M.: A. swears that he bought on his own account, and that he intended to ship through G. and M., and would probably pay by their acceptance. The day after the bargain B. writes to his Liverpool agents to enquire as to the standing of G. and M., and stating that A. was making a large purchase of goods for them. This letter was held to be properly receivable as part of the *res gestæ*, and the decision has I think a strong bearing on this and also on the second and fifth objections urged by defendants.

This fifth objection points to the allowance of the document called a bank statement, sent by the plaintiffs' Hamilton agent to the Head office at Kingston, shewing how the account was kept. I see no valid objection to this.

I feel more doubt on the second objection, to the admission of the evidence of the bank directors of what their cashier, Ross, had reported to them as to what had taken

place between him and Reynolds in Toronto when the arrangement was made for opening the account.

In the case last cited *Pollock, C. B.*, says "It is certain that a mere statement, as when a person returns, for instance, from the Exchange to his counting-house, and says, 'I have sold such and such things,' that would not be evidence of the fact."

But in the present case we have to consider the position of the parties. A very serious contract is under discussion between Reynolds and the cashier, Ross. The latter was not dealing for himself, but, as all parties well knew, as the agent of a corporate body, with a board of directors who could either sanction or repudiate his acts, and to whom he would have to report his proceedings for approval.

On looking back to the evidence, it may be truly said that it amounts to very little, and can hardly have weighed seriously with the jury.

Three directors were examined. Dr. Robertson's evidence is quite unimportant: he says nothing on the disputed point. Mr. Strange's testimony merely amounts to this, that, as he supposed, the directors sanctioned a loan to the Great Western Railway Company. Mr. A. J. Macdonell's evidence seems alone open to the objections urged. He states, in substance, that Mr. Ross usually reports all important matters to the board for approval, and that on his return from Toronto, after the interview, he reported that credit was to be given to the Great Western Railway Company; and that the board would never have consented to giving a credit to the Detroit and Milwaukee Company, and that he never heard that such a thing had been asked. But, on further examination, Mr. Macdonell evidently could not remember any distinct report made to the board, or discussion of the matter on Ross's return, and the impression left on my mind from perusing his answer is, that it is uncertain whether he heard this from Ross in the form of a report to the board, or on one of the occasions of which he speaks:—"Sometimes (page 57) I am not present at the board meetings, but I have conversations with Mr. Ross on the affairs of the bank almost daily;" and to the question, on cross-

examination, "Have you any very distinct recollection of this matter being discussed when Mr. Ross returned?" he replies "There were so many things submitted that I cannot remember it very distinctly."

I think this evidence cannot be upheld except on the principle of a report or return made by an officer or cashier of a public company in the course of his duty to his superiors, with whom lay the power of approval or disapproval of his acts. Mr. Macdonell's evidence very faintly, if at all, places it in this light. I presume he and his co-directors could be properly examined to prove that they as directors never sanctioned or heard of any proposition to lend money to the Detroit and Milwaukee Company, or to any other but the Great Western Railway Company, and it is a step very slightly in advance of this to state that from their cashier's report to them they understood the matter in that light.

If at the time of the negotiation between Ross and Reynolds it was an understanding of the parties that the proposed credit (to whomsoever given) should be referred to the Commercial Bank board, it will naturally seem that Ross's carrying out such understanding would be fairly considered as part of the *res gestæ*.

In Ross's evidence, on cross-examination, (page 38), he is asked thus: "It seems to have been understood between these gentlemen that a reference of these matters to the board was necessary before any definite arrangement could be made. You could not of yourself grant a credit to Messrs. Brydges and Reynolds without a reference to your board?" *Answer*—"I was in the habit of referring matters of consequence to the board, for the sake of advising with the directors upon them."

Again, at page 39, "Did you lay the schedule before the board?" *Answer*—"Not that I remember. * * I explained the matter to the board, and in the minutes of the 31st of December there is an allusion to it. * * I told Mr. Reynolds I had no doubt that the arrangement would be carried out."

It would thus appear that Ross would be by all parties naturally intended to report all this to his board for approval,

to complete the transaction, and therefore I have come to the conclusion—not however without some hesitation—that as part of the *res gestæ*, as "a declaration accompanying an act," his report to his directors was admissible. See Starkie on Evidence 52–3.

I desire to adopt the most liberal construction of the rules of evidence. Infinite mischief has been done for generations by errors on the opposite side. I think that as the law is now administered we are safe in adopting the less stringent rule. I repeat however that I attach but slight importance to the evidence now objected to, and can hardly believe that its reception in any way whatever influenced the result.

The third objection to evidence is as to receiving the copies of the proceedings of the Great Western Railway London Board, without its appearing that such documents were in fact copies of the original proceedings: "the only evidence of there being copies, or that there ever were such documents, being that of defendants' secretary, that said copies were sent to this country by the officers of the company in England as such copies, but whether they were copies or not he did not know."

I think the objection stated in the rule gives its own answer in the words above quoted. The secretary of the directors here proves the official receipt of such documents by the Canadian board, to be treated by them as official and authoritative. I should be sorry that such a mode of proof could be found to be objectionable.

The last objection to evidence requiring notice is number 4, as to the admissibility of what was called the "Red Book," of charges against and answers by the directors of the Great Western Railway.

In my view of the case I attach little or no importance whatever to this book or its contents. On the evidence of Messrs. Muir and Stephens (at pages 47 and 48,) it is shewn that these red books were sent out by the English Board to the Canadian Board. Mr. Stephens, the defendants' secretary, says they were circulated here when received among the shareholders as the report of the company, and he points to minutes of the Board here bearing on the subject of this

report. I think it was fairly receivable in evidence, as a document adopted and circulated by the defendants' board here.

I therefore think that there is no ground for a new trial for the reception of improper evidence. I have already stated my views as to the various legal exceptions taken against the maintenance of the action, and I think they apply to nearly all the voluminous objections in the rule to shew cause.

Before summing up my views I should perhaps notice the objection to one of the questions submitted to the jury: namely, as to the Great Western Company "reaping the benefit" of the expenditure of the plaintiffs' money on the Detroit and Milwaukee line.

It is said that such a question was too vague and general. If the question were proper in any shape, it is not easy to see how it could be framed in a less objectionable form.

The decision at which I have arrived does not depend upon the finding of the jury on that point, and would be the same had such a question been omitted from those submitted to them.

It is needless to premise, that in a matter so complicated as this has become, in the dealings between these companies, and in the rather unsettled state of the law for many years past as to the rights and powers of corporations to contract otherwise than under seal, an opinion formed on the points submitted for our judgment can hardly be delivered without some hesitation.

On the best consideration that I have been able to give to the case, I have arrived at the following conclusions:—

That the first loan of £150,000, sterling, to the Detroit and Milwaukee Company, was sanctioned by the subsequent act of parliament, and declared in express terms to be valid:—

That as to the second loan, of £100,000, sterling, there was nothing on the face of the resolution to shew that it was to be expended in a manner contrary to law:—

That on the faith of these resolutions, and of the arrangements made by the two managing directors of defendants,

the Commercial Bank agreed to open the account, which they call "The Detroit and Milwaukee Railway account, Great Western Railway:—that they, then and previously being the general bankers of the Great Western Railway, continued to advance large moneys on this account; and the mode by which they were to be repaid such advances was by paying into them all the traffic receipts of the Detroit and Milwaukee Company, and covering the deficiency from time to time by drafts, in sterling exchange, drawn by the Great Western Railway officers here on the then English Board:—

That of the two loans, of £250,000, they in fact have only received about $700,000, leaving about £100,000 sterling thereof which never reached them:—

That the advances continued to be made for over two years, till a very large balance remains due to the plaintiffs:—

That it was a question of fact to be decided by a jury, and not a legal matter for the court, as to whom and on whose credit the bank really advanced its money—whether to the Detroit and Milwaukee Company, to Messrs. Brydges and Reynolds individually, or to the Great Western Railway Company:—

That there was evidence to go to the jury on this point, although the common seal of the Great Western Railway Company was not used to sanction the acts of its officers or directors, or to shew the assent of the corporation to the liability:—

That for the reasons previously given there is no objections to the bankers recovering the balance due on the ground that such an expenditure was beyond the statutable powers of their customers as a chartered company:—

That there is no ground for nonsuit or for new trial for misdirection or admission of improper evidence:—that the questions submitted to the jury by the learned judge were substantially calculated to aid the jury in determining the issue joined, and are not open to serious objection.

And as to the merits, I see no safe ground on which the court can determine that the jury found for the plaintiffs, either without sufficient evidence or against the weight of evidence.

As I understand, the question of amount was agreed to be settled by a referee, who could state a case, if required, to the court. I do not feel it necessary to do more than express my view of the principles by which I consider the case to be governed.

It is satisfactory to feel that in a case of this magnitude the opinion of a Court of Error can be taken on the serious questions involved.

McLEAN, J.—concurred, and said that he had been desired by Mr. Justice *Burns* to state that he also fully agreed in the judgment just delivered.

Rule discharged.